Supreme Court, U.S.
FILED

No. (1) 96 1560 DEC 13 1996

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In The

Supreme Court of the United States

October Term, 1996

ELLEN P. FULFREE,

Petitioner,

against

ROBERT MANCHESTER and
MANCHESTER LAW OFFICES,

Respondent,

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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24 pp

Statement under Rule 14. subd 1(a)

The questions presented for review are as follows:

1. Whether an order of district court denying remand of a case commenced in state court is reviewable by the United States Court of Appeals.

2. Whether a district court has power to deny remand where there is a total absence of a federal question in the complaint, two notices of removal and in the decision of the District Court.

3. Whether 28 US Code 1332(A116) now applies to removal and remand of cases commenced in state courts.

4. Whether District Court exceeded its powers by granting leave to serve an amended notice of removal 136 days after the service of the summons and complaint.

5. Whether there is conflict in the decisions of the US Court of Appeals of the 2nd Circuit in other cases with that court's disposition in the instant case, and whether there is conflict between the instant disposition and decisions of the other US Courts of Appeal.

6. Whether there were not substantial procedural errors in both the notice of removal and the "amended notice of removal".

7. Whether the rendering of summary disposition which prohibited publication of the same and its use as stare decisis deprived petitioner of due process and equal protection of law.

Statement under Rule 14, subd 1 (b)

All parties involved in this action are correctly named in the caption hereof. There are no parent companies; there are no wholly owned subsidiaries. Appeal is from US Court of Appeals, 2nd Circuit.

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Statement under Rule 14 subd 1 (c)

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Statement under Rule 14 subd 1(d)

Petitioner has long since written to the Clerk of the District Court, Southern District of New York, asking if the decision of the District Court has been published and Petitioner has received no response. Petitioner has no knowledge on whether it has been published. The opinion of the District Court appears in the appendix at A 5.

The summary disposition of the US Court of Appeals is prohibited to be published and thus does not have, and will not ever have, a citation. It appears herein in the Appendix at A94 .

Statement under Rule 14 subd 1 (e)

i) The decision and order of the District Court is dated January 2, 1996 (A 5). The summary disposition in the US Court Of Appeals is dated October 4, 1966 (A115).

Statement under Rule 14 subd 1e (ii)

Not applicable.

Statement under Rule 14 subd 1e (iv)

Jurisdiction exists under 28 US Code 1254 and 28 US Code 6511 and Rule 10 of the Rules of the United States Supreme Court, and

28 US Code 2101 (e)
28 US Code 1254 (i)
28 US Code 2101
Rules of the US Supreme Court-Rule 10(a) and (c)

Statement under Rule 14 subd 1(f)

28 US Code 1331
28 US Code 1332
28 US Code 2101
28 US Code 1254

Rule 11 of the Federal Rules of Civil Procedure Fourteenth Amendment of the US Constitution Fifth Amendment of the US Constitution

28 US Code 1441
28 US Code 1443
28 US Code 1446
28 US Code 1447
28 US Code 1738
28 US Code 2101
N.Y.S. Constitution Art. 6 §6 subd e
28 US Code 1254

Statement under Rule 14g(i)

In the state court matters did not set beyond the pleadings stage before removed.

Statement under Rule 14g(ii)

It is the contention of the Petitioner that the court of first instance, District Court, SDNY, had no jurisdiction of the subject matter of this action, and lacked subject matter jurisdiction to deny the motion to remand to state court.

Statement under Rule 14 subd g

The plaintiff on August 15, 1995 commenced action in the Supreme Court Westchester County against two defendants, a natural person domiciled in Vermont and a corporation believed to be organized and existing under the laws of Vermont. Service of the summons and complaint, according to defendant, was accomplished August 23, 1995. (All) The plaintiff is, and was, a resident of the City of Yonkers, County of Westchester and State of New York. (A12, A16)

Defendants served a notice of removal to the United States District Court for the Southern District of New York, Foley Square, New York City, dated September 11, 1995. (A9) On or about October 2, 1995 Plaintiff moved in the District Court for the Southern District of New York for an order remanding the case to the Supreme Court Westchester County, sitting in White Plains, New York. (A4) The District Court denied the motion to remand in a memorandum decision and order dated January 2, 1996. (A5) In the said order defendant was granted leave to serve an amended notice of removal. Defendants served an amended notice of removal dated January 6, 1996, received on or about January 9, 1996. (A111) Plaintiff urges, even aside from defects in both notices to remove, that since there is no federal question, the District Court was without jurisdiction to make an order denying remand.

It is submitted that it was beyond the power o9f the District Court, and abuse of discretion, to grant defendant leave to serve a new and amended notice of removal by order dated January 6, 1996. Also, more importantly, plaintiff urges that when there is no federal question presented under 28 US Code 1331, there is no power in the District Court to remove and no power to deny remand to the state.

Further, since there is no federal question present, that is, no question of the kind set forth in 28 US Code 1331, the diversity of citizenship is entirely irrelevant to the questions of removal and remand, and has no tendency to support removal from state court to federal court.

Argument under Rule 14 subd h

POINT I

THE INSTANT APPEAL IS AN APPEAL AUTHORIZED BY STATUTE AND RY TtIE DECIDED CASE LAW, AND IS ONE NOT PROHIBITED BY SUBDIVISION (d) OF 28 US CODE 1447, AND IS IN ALL RESPECTS A FINAL ORDER.

28 US Code 1447 subd.(d) provides:

> (d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

Section 1443 deals with Civil Rights cases, only, and need not detain us.

An order granting removal is reviewable by the Court of Appeals whereas an order remanding an action is not reviewable.

> Chandler v. O'Bryan, 496 F2d 403, cert. den 419 U.S. 986, 95 S.Ct. 245, 42 L Ed 2d 194 rehearing denied 420 U.S. 913, 95 S.Ct. 838, 42 L Ed 2d 845.

The cited case dates from 1974, before the 1988 amendment. Before 1588, removal was accomplished by a petition to the District Court which was granted the power to grant or deny such a petition. Now removal is accomplished unilaterally by a notice served by defendant's attorney. There is no longer an appeal from an order of removal since it is not an order but simply a paper authored by one side, never sanctioned by the court. The only remedy for a plaintiff now is a motion to remand which serves the same function as the prior appeal from the granting of an order of removal, which was specifically allowed by the statute and by the holding of Chandler v. O'Bryan, supra.

If, indeed, an order of the Court to remove from the state court to the District Court was reviewable, a fortiori, the unilateral act of serving a mere notice signed by a party's lawyer must be subject to review. The only way that such a fait accompli can be tested under the present practice is by a motion to remand to state court. If an

order granting removal duly entered by the District Court was reviewable under the former practice, a fortiori, now, a unilateral notice by a litigant is reviewable. Therefore a motion to remand serves the same function as serving papers in opposition to the former petition for removal. By simple analogy, it is clear that if an order of removal was reviewable before 1988, an order denying remand is now reviewable. Removal from state court to District Court remains reviewable, irrespective of the manner in which review is accorded.

Otherwise a plaintiff would be subject to an absolute power vested in his adversary, whose exercise could not be reviewed by any court or judge. Such a proposition would raise constitutional questions with which the courts and litigants can well afford to live without.

The December 9, 1991 revision of 28 US Code §§ 1441-1447 (A 118) was a portion of the enormous overhaul of the federal judicial system, whose stated purpose was to end resort to federal courts in cases which had no claim to federal attention, except diversity of citizenship; in other words cases where there was no federal question to be decided. This accounts for the specific direction of § 1447(d) supra which carefully prohibits review of cases granting remand but just as carefully leaves in place the right of review in cases denying remand.

By its plain language it prohibits review of an order granting remand (except in Civil Rights cases) but leaves intact the right of review of orders denying remand.

An order granting remand relieves the federal courts of the burden of processing appeals in cases, of which the district courts lack jurisdiction.

A horrible example which demonstrates the need for such amendment is Gully v. First National Bank, 291 , U.S. 109, 57 S.Ct. 96, where a case was remanded to state court after trial and judgment

and after appeal to the U.S. Court of Appeals and appeal to the U.S. Supreme Court. There are many other cases where remand is granted after judgment. This accounts very plainly for the desire of Congress and the revisers to be sure that all cases which did not contain a genuine federal question be remanded and be remanded promptly.

To make assurance doubly sure, 28 US Code 1447 subd (c) provides in part as follows:

> "(c) If at any time before final judgment it appears that district court lacks subject matter jurisdiction, the case shall be remanded..." (emphasis added)

This is a very plain command that motions to remand, for lack of subject matter jurisdiction, shall be made as early as possible, to assure a remand before the expenditure of District Court time on motions, discovery, and judgment, and possible appeals. Such a command plainly includes a command that removal and remand are to be disposed of at the outset if possible, including appeals from orders denying remand.

Cases in which the U.S. Court of Appeals of the Second Circuit accepted and decided cases on appeal from matters of removal are the following:

> Encoder Communications, Inc. v. Telegran, Inc., 654 F 2d 198 (2nd Circuit 1981);
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> Hamilton v. Aetna Life, 5 F 3d 642 (2nd Circuit 1981);
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> Minot v. Eckhardt-Minot, 13 F 3d 590 (2nd Circuit 1994);
>
> Morgan Guaranty Trust v. Republic of Palau, 24 F 2d 1237 (2nd Circuit 19911);
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> Byrnes v. Faulkner, 362 F. Supp. 804, affirmed 550 F 2d 1303 (D.C.N.Y. affirmed by Court of Appeals for the 2nd Circuit);

La Farge Copper v. Venezolana De Cementos, 31 F 3d 70 (2nd Circuit 1994);

R.G. Barry Corp. v. Mushroom Makers, Inc., 612 F 2d 65 (2nd Circuit 1979),

Relevant also is Wilson v. Republic Steel, 257 US 92, 42 S.Ct. 36.

This writer is prepared to cite 23 cases in other circuits where appeals were heard in removal-remand cases but page limits and discretion demand that this petition cite a few representative cases:

PAS v. Travelers Insurance Co., 7F 3d 349 (3rd Circuit);

Sheeran v. General Electric, 573 F 2d 293 (9th Circuit, Cert den 444 US 868);

Alexander v. Electric Data Systems, 13 F 3d 940 (6th Circuit 1994).

Even aside from the other grounds urged for reviewability of removal-remand controversies is the fact that a removal order is a final determination since it extinguishes forever the case commenced in the courts of the State of New York, commenced there as a matter of right.

Subdivision (c) of 28 US Code 1441 (A119) is different from anything in the law before December 9, 1991 in thrust and application. Before there is discretion (and jurisdiction) to remand here there must be a "§1331" question combined with "otherwise non-removable claims." If there is no "§1331" question, this section gives no authority to a defendant to remove a case to federal court, and no discretion or power in a district court to deny a remand to the state court from which the case came.

Where however, there are combined both a "federal question" and non removable claims" the District Court has discretion to

"determine all issues therein, or, in its discretion, may remand all matters in which State law predominates". If there is no federal question, there is no discretion in District Court to "determine all issues therein, or, in its discretion, may remand all matters in which State law predominates." If there is no federal question, there is no discretion in District Court to deny remand.

In the instant case there is no suggestion that there is even the smallest federal question presented. Neither side has made the faintest suggestion that any federal question of any kind is here presented. Even more compelling the notice of removal fails to show, or even hint, that there is a federal question presented. The decision of the District Court fails to find any federal question. Under such a circumstance there is no power in anyone to remove the case, or to deny remand to state courts. (A 11 , A 5)

Cases decided since the 1991 amendment have uniformly applied the rule that, even where there is a federal question, if questions of state law predominate, the matter must be remanded to the state court from which they were removed.

Lang v. American Electric Power Co., Inc., 785 F. Supp. 1331;

Moralez v. Meat Cutters Local 13, 778 F. Supp. 368;

Moore v. Di Blase, 766 F. Supp. 1331;

World Omni Leasing, Inc., 764 F. Supp. 1442;

Martin v. Drummond Coal Co., Inc., 756 F. Supp. 524;

Martin v. Kernal County, 561 F. Supp. 726 (pre 1991).

A District Court lacking subject matter jurisdiction (§1331 question) must remand the matter to the state court.

Caterpillar, Inc. v. Williams, 482 U.S. 386;

Franchise Tax Board of California v. Construction Laborers, 463 U.S. 2;

Nichols v. Southeast Health Plan, 859 F. Supp. 844;

Oldham v. American Civil Liberties Union 849 F. Supp. 611;

Chittick v. Farmers Insurance Co., 844 F. Supp. 1153;

Blunter v. Greenwood Trust, 856 F. Supp 207.

Tort actions and contract actions under state law are not matters involving federal questions, even where the genesis of such actions rests upon federal rights, restrictions and/or prohibitions.

Lyster v. First National Bank, 829 F. Supp. 1163;

State of Minnesota v. International Association of Entrepreneurs, 858 F. Supp. 937;

Hunneman Real Estate Corp. v. Eastern Middlesex Assn., 860 F. Supp. 906;

Carr v. Axelrod, 798 F. Supp. 168 (E.D. Dist. N.Y.) aff'd 996 F2d 302, cert. den. 114 S.Ct. 334, 126 L Ed 2d 308;

Lamston v. Firestone, 724 F. Supp. 511;

Walsh v. Seagull Energy, 836 F. Supp. 411;

Anderson v. American Airlines, 2 F 3d 590;

Pitchford v. Alladin Steel, 828 F. Supp. 610;

Hunter v. Greenwood Trust, 856 F. Supp. 207;

It is an essential prerequisite of removal to the District Court that the federal question must be pleaded in the complaint, that it must be substantial, and it may not be inferred from the contents of the answer.

Caterpillar v. Williams, 482 U.S. 386;

Cook v. Yorktown Steel, 770 F 2d 1272;

Franchise Tax Board of California v. Construction Laborers, supra;

Charter Fairmont Institute v. Cella Health Strategies, 835 F. Supp. 233;

Bender v. Prudential Ins. Co., 860 F. Supp. 610;

Pitchford v. Alladin Steel, Inc., 828 F. Supp. 610;

Bailey v. Norfolk and Western Rwy. Co., 828 F.Supp. 218;

Costantini v. Guardian Life, 859 F. Supp. 89;

Hill v. Marstan, 13 F 3d 1548;

Nelson v. United Artists, 835 F. Supp. 844;

In the instant case there is not one word in the complaint implying that there is even a hint of a federal question present. The instant case is based entirely upon New York State law of torts and a New York State statute dealing with certain forms of malpractice by lawyers.

Paragraph 3 in the original Notice of Removal and paragraph 3 in the amended Notice of Removal both say:

"3. The ground for removal is that diversity jurisdiction exists, as there is complete diversity of citizenship and the amount in controversy exceeds the sum of $50,000.00."

The District Court relied upon the same grounds. (A6) Diversity of citizenship is still good ground for commencing suit in federal court, but it is no longer a ground for removal from a state court in the absence of a question defined in 28 US Code 1331.

While it would not matter if there were such a suggestion in defendant's answer or in the notice of removal, it is most interesting and conclusive that neither of those utterances by defendant deal with any issue which could possibly be deemed a "federal question".

POINT II

THE DISPOSITION OF PLAINTIFF'S APPEAL BY THE U.S. COURT OF APPEALS DEPRIVES PLAINTIFF OF DUE PROCESS OF LAW AND OF EQUAL PROTECTION OF LAW.

Both the Fifth Amendment and the Fourteenth Amendment of the U.S. Constitution now guarantee due process of law and equal protection, and as they are now interpreted, these rights are guaranteed not only against the action of the several states, but against action by the United States Government itself.

28 US Code 1738 (A 123)

Hampton v. Mow Sun Wong, 426 U.S. 88, 96 S.Ct. 1895;

Weinberger v. Weisenfeld, 420 U.S. 636, 95 S.Ct. 1225.

The summary disposition by the US Court of Appeals in this case dated October 4, 1996 deprives plaintiff, both of due process of law, and of equal protection of law. (A 115) It provides:

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO TIME ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE. IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

There is no rational basis for using such a summary disposition instead of the ubiquitous "Affirmed without opinion". There is a distinction between the two but not a rational one. The distinction is that the Court of Appeals panel did not have enough faith in the correctness of this result to expose it to the view of other courts, of the members of the bar, federal and state, of federal and state officials, and of the public generally.

This entire matter of secrecy by courts and its invasion upon the common law right to know of the public the contents and records of court proceedings has been dealt with in the case of Richard M. Nixon v. Warren Communications, 435 US 58, 8 S.Ct. 1306, 55 L Ed 2d 570, dealing with the famous presidential tapes. There were four dissenting justices who wrote three dissenting opinions. All of the four opinions (majority and dissents) recognized that there is a common law right in the public generally to have access to judicial records. Justice Marshall described it as "a precious common law right, one that predates the Constitution itself." There the Court denied access to the tapes (1) because of the terms of a special enactment dealing with them, The Presidential Recordings Preservation Act and (2) more importantly because the content of the tapes had long since been disseminated to the general public by radio and television, and the Communications Co. sought them only for commercial purposes, and not to further any purpose connected with the public's right to know the contents of the court's records.

This holding does not diminish the public's right to know. On the contrary it reinforces it. What is done in the instant case, the use

of a secret disposition, is not only foreign to the holding of Nixon, it is a procedure dangerous to our whole democratic structure.

Where there is an overpowering reason for sealing some records, most typically a case of multiple rape of a young female, the Court held that the sealing of the record or parts thereof must be performed by the Court which is the custodian of the records, to wit, the trial court.

POINT III

THE COURT BELOW LACKED POWER TO GRANT LEAVE TO SERVE AN AMENDED NOTICE OF REMOVAL UNDER TIME CIRCUMSTANCES OF THIS CASE, SO THAT SUCH AN AMENDED NOTICE WAS SERVED 139 DAYS AFTER TtIE SERVICE OF THE COMPLAINT WHICH STARTED TIME RUNNING OF TIME 30 DAYS PERMITTED BY LAW FOR TFtE SERVICE OF A NOTICE OF REMOVAL.

The District Court herein held that there is no power in the District Court, in the face of a fundamental defect, to extend the 30 day time limit for serving a notice of removal. Lack of jurisdiction is certainly a fundamental, fatal flaw and is a matter of great substance. In addition, the notice of removal and the amended notices of removal are deficient as a result of the fact that both bear the same blemishes. It is submitted that all of the defects in the notices of removal are fundamental.

28 US Code 1446 (a) provides that a notice of removal shall be "signed pursuant to Rule 11 of the Federal Rules of Civil Procedure. (A119)Subdivision (b) of the same section provides that a notice of removal must be served within 30 days after defendant receives "a copy of the original pleading." (All9)

Use of the word "shall" shows that compliance is mandatory and that compliance was not intended to be grade as to which are grave and which are middling and which are slight.

Holding that the 30 day requirement is mandatory are:

Burns v. Standard Life Insurance, 135 F. Supp. 904;

Biscup v. People of the State of N.Y., 129 F. Supp. 765 (W.D. NY);

Castle v. Laurel Creek Co., 848 F. Supp. 62;

Bradwell v. Silk Greenhouse, 828 F. Supp. 940.

Very important here, are the holdings that the policy of the law is against removal, and that all questions on remand, must be resolved against the person seeking removal to Federal Court.

Beech v. Prudential, 845 F. Supp. 829;

Alexander v. Electronic Data Systems, 13 F. 3d 940;

Wesley v. Mississippi Transport, 857 F. Supp. 523.

All of the defects relied on by plaintiff in its motion to remand are substantial. Most astonishing is that even in the "amended notice of removal", the defendant failed to mention, or suggest, or even hint, at the presence of a federal question in plaintiff's complaint. (A44)

Compliance with Rule 11 is mandatory in the drafting of a notice of removal: §1446(a) of title 28 US Code requires that the notice of removal shall be signed in the manner required by Rule 11 of the Rules. (A122)

It is immediately apparent that signing by an individual attorney "in the attorney's individual name" is designed to perform the office formerly accomplished by a verification under oath in a pleading, or in an affidavit.

The United States Supreme Court has decided the very ques-

tion raised in this discussion in Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120.

Pavelic and LeFlore was a law partnership. LeFlore, a partner, signed several papers as follows:

> "Pavelic and LeFlore
> By (s) Ray L. LeFlore
> A Member of the Firm
> Attorneys for the Plaintiff"

The Court held that the fact that LeFlore signed explicitly for the firm was of no consequence since Rule 11 says "that the paper must be signed by at least one attorney of record in the attorney's individual name" (Emphasis in the original).

On page 126 the Court said as part of its holding the following:

> "The purpose of Rule 11 as a whole is to bring home to the individual signer his personal, and non-delegable responsibility."

Relative to the matter of Mr. Adams signing as "Associated with the firm" the Court said at page 127:

> 11. Moreover, the psychological effect aside, there will be greater economic deterrence upon the signing attorney, who will know for certain that the district court will impose its sanction entirely upon him, and not divert part of it to a partnership of which he may not (even he is only an associate) be a member, or which (if he is a member) may not choose to seek recompense from him.

Mr. Adams as an associate was not the attorney of record, nor part of the attorneys of record.

It is worthy of note that in the original notice of removal Mr. Adams' signature consists only of a capital "M" with no surname or

no initial designed to indicate a surname. (A10, A13) This was clearly not even a colorable effort to comply with Rule 11. (A 122)

The defects in the notice of removal which are essential matters of substance are not remedied in the so-called amended notice of removal and are as follows: (1) lack of any showing of subject matter jurisdiction discussed above (2) failure to sign in a manner mandated by Rule 11 of the Federal Rules of Civil Procedure (3) failure to designate the Westchester (White Plains) Division of Southern District of New York (4) failure of defendant to serve the Clerk of the County of Westchester, and make proof of such service upon said Clerk, and failure to identify him by name.

1. Lack of subject matter jurisdiction has already been discussed.

2. The signature in the notice of removal and in the amended notice of removal fail to comply with Rule 11 of the Rules of Civil Procedure, which compliance is mandatory in a notice of removal under §1446(a) of title 28. (A 119)

3. The notice of removal is directed to "the Clerk of the Court", a title which does not exist in any Supreme Court of the State of New York and does not identify by name the person served.

There are many clerks in the courtrooms of the Supreme Court of Westchester County, all of them clerks of various parts of Special Terms or Trial Terms or any extraordinary term created. There is no such person in existence who wears, or who is entitled to wear, the title "Clerk of the Court" or "Clerk of the Supreme Court".

The Constitution of the State of New York provides in its Article 6 §6 subd. e:

> The clerks of the several counties shall be clerks of the supreme court, with such powers and duties as shall be prescribed by law.

The clerks of the various parts of the Court are simply deputies appointed by the County Clerk himself, and the Clerk must act in his capacity as is prescribed by the constitution and may not appoint anyone to act during his absence, not his deputy or anyone else.

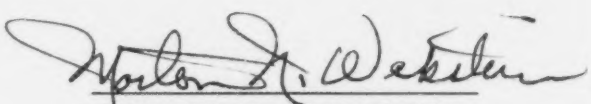
Devoy v. Craig, 196 App. Div. 567, 178 N.Y. Supp. 478 aff'd 231 N.Y. 186.

Therefore the failure to show on the notice of removal that it was directed to the County Clerk of Westchester County, and the failure to append proof of service upon that official, and to set down the name of the person served constitute fatal defects in the notice of removal.

Moreover, it is not possible to determine the identity of the person served with the notice of removal or his title and position.

4. The notice of removal is defective in that it fails to seek removal to the White Plains Division of the Southern District of New York.

Wherefore the petitioner respectfully asks that this petition be granted, and that such other and further relief as the Court deems proper in the premises be granted.



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